PP

v.

TAN SIEW HUI

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED APANDI ALI J
[CRIMINAL APPEAL NO: 42-6-2004]
6 MARCH 2008

SECURITIES: *Shares - Allocation of shares - Submission of information to Securities Commission regarding Pink Form allocation pursuant to proposed listing of company at Bursa Saham Kuala Lumpur - Whether false information regarding employee allocation of shares submitted to Securities Commission - Section 32B(1)(c)(aa) Securities Commission Act 1993 - Paragraph 10.19 of Securities Commissions Policies & Guidelines - Board of Directors given discretion to determine allocation of shares - Whether essential ingredients of offence under s. 32B(1)(c)(aa) proven*

SECURITIES: *Shares - Central Depository - Whether depositors of Central Depository entitled to number of securities stated in record of their CDS accounts*

COMPANY LAW: *Shares - Allotment of shares - Information regarding Pink Form allocation required to be submitted to Securities Commission - Whether employee shares allocation list submitted to Securities Commission contained false information - Whether allocation of shares materialized by crediting shares into CDS account - Whether allocation of shares false*

EVIDENCE: *Parol evidence rule - Evidence Act 1950, ss. 91 and 92 - Whether application forms for allotment of shares a contract subjected to purview of ss. 91 and 92 - Whether oral evidence can be adduced to contradict, vary, add or subtract from terms of application form - Whether ss. 91 and 92 applicable to criminal cases*

The respondent was charged with an offence under s. 32B(1)(c)(aa) of the Securities Commission Act 1993 (the Act). The charge was that the respondent had in relation to the information regarding allocation of shares of TCL Premier Holdings to the employees of TCL Premier Holdings Berhad (TPHB) group, which had to be submitted to the Securities Commission under s. 32 of the Act pursuant to the proposed listing of TCL Premier Holdings Berhad at Bursa Saham Kuala Lumpur, had caused to be presented to the Securities Commission false information

contained in the enclosure to a letter dated 6 January 1997. The said letter enclosed a revised Pink Form allocation list (*ie*, a list of names of employees that were entitled for allocation of Pink Form shares of TPHB). The list was as at 27 December 1996. The essence of the prosecution's case was that the said information submitted to the Securities Commission was false as 20 of the employees were not entitled to the shares that were stated to be allocated to them. The prosecution claimed that these shares were later transferred out. The Securities Commission had earlier approved a Pink Form allocation list and later the revised list was submitted to amend the earlier approved list. The only relevant difference between the contents of the allocation list and the revised allocation list was a minor increase of 2000 shares. Out of the 20 employees, 12 of them were called as witnesses. All of them testified that they knew of their respective allotment by notice on the Company's Notice Board; that they applied for all the shares allotted to them; that all shares applied for were paid for and credited into their respective CDS accounts; and that they later transferred some of the shares. The learned Sessions Court Judge held at the end of the prosecution's case that the prosecution had failed to prove its case in respect of two essential ingredients, namely (i) the false or misleading information and (ii) that the submission of such false information was caused by the accused. The prosecution appealed against the decision of the learned Sessions Court Judge's in acquitting and discharging the respondent at the end of the prosecution's case.

Held (dismissing the appeal by the prosecution):

(1) The falsity or otherwise of the said revised list had to be construed at that material time, namely on 27 December 1996. (para 5)

(2) With the minimal change in the actual share allocation and with the fact that the allocation list was actually approved much earlier by the Securities Commission, it was preposterous to say that the list contained false information. (para 18)

(3) The application forms for the allotted shares is a contract that is subjected to the purview of ss. 91 and 92 of Evidence Act 1950. The prosecution's witnesses cannot by oral evidence contradict, vary, add or subtract from the terms of the document of the contract, namely the application form. (paras 25, 26 & 28)

(4) All the witnesses were depositors of the Central Depository. Such depositors, in law, are deemed to be entitled to the number of securities stated in the record of their CDS accounts. It is a presumption under the law, of the rights and entitlement of these witnesses. Where the allocation was materialised by application and solidified by the crediting of the shares into the respective CDS accounts of the applicants, it clearly showed that the allocation was not false. Any subsequent transfer of a portion of the allotted shares did not in any way make the original allocation false. (para 31)

(5) Under paragraph 10.19 of the Securities Commissions Policies & Guidelines although not having a force of law, but regulatory in nature, the Company's Board of Directors was given the discretion to determine the allocation. The Respondent was just an employee of the Company and she acted at the behest of the Board of Directors. There was no evidence to show that the respondent ever had the power or authority to cause the Pink Form allocation list to be submitted to Securities Commission. (paras 36 & 37)

(6) The trial judge was correct in his findings. The only ingredient that had been proven by the prosecution was that the information in the Pink Form allocation was required to be submitted to the Securities Commission in connection with a proposal under s. 32 of the Act. The other two essential ingredients had not been proven. (para 40)

Case(s) referred to:

Ah Mee v. PP [1967] 1 MLJ 220 ***(refd)***

DG of Inland Revenue v. Ee Sim Sai [1977] 2 MLJ 32 ***(refd)***

Inspector General of Police & Anor v. Alan Noor Kamat [1988] 1 MLJ 260 ***(refd)***

Mears v. Western Canada Pulp And Paper Co Ltd [1905] 2 Ch 353 ***(refd)***

NS Narainan Pillay v. The Netherlandsche Handal Maatschappij [1934] MLJ 227 ***(refd)***

PP v. Krishnan Letchumanan & Anor [1996] 2 CLJ 337 HC ***(refd)***

PP v. Sulaiman Mohamad Noor [1996] 1 MLJ 196 ***(refd)***

Tan Chong & Sons Motor Co Sdn Bhd v. Alan Mcknight [1983] 1 MLJ 220 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, s. 11(c)
Companies Act 1965, ss. 103(1), 107B(1)
Evidence Act 1950, ss. 91, 92
Prevention of Corruption Act 1961, s. 4(c)
Securities Commission Act 1993, s. 32(1)(c)(aa)
s. 107B (1) -(5)

Other source(s) referred to:
Jowitt's Dictionary of English Law, 2nd edn, vol 1

For the plaintiff - Roz Mawar Rozain, DPP
For the respondent - Wong Kian Kheong (Karen Lee Foong Voon with him); M/s Wong Kian Kheong

Reported by Amutha Suppayah

JUDGMENT

Mohamed Apandi Ali J:

[1] This is an appeal by the prosecution against the decision of the learned Sessions Court Judge's decision in acquitting and discharging the respondent, at the end of the prosecution's case. The charge against the respondent, as quoted in the petition of appeal, (which is an amended charge that was tendered just before prosecution closed its case) reads as follows:

> Bahawa kamu, pada 6 Januari 1997, di Suruhanjaya Sekuriti, No. 3, Sri Semantan Satu, Off Jalan Semantan, Bukit Damansara, 50490 Kuala Lumpur di dalam Wilayah Persekutuan, berkenaan dengan maklumat peruntukan syer (saham) TCL Premier Holdings Berhad kepada kakitangan kumpulan TCL Premier Holdings Berhad, yang mana ianya perlu dikemukakan kepada Suruhanjaya Sekuriti berkaitan dengan cadangan penyenaraian TCL Premier Holdings Berhad di Bursa Saham Kuala Lumpur yang dikemukakan menurut seksyen 32 Akta Suruhanjaya Sekuriti 1993 (Akta 498), telah menyebabkan dikemukakan kepada Suruhanjaya Sekuriti maklumat palsu dalam lampiran yang dilampirkan bersama surat bertarikh 6 Januari 1997, di mana lampiran tersebut dilampirkan bersama pertuduhan ini dan maklumat yang palsu digariskan dengan merah, dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 32B(1)(c)(aa) Akta Suruhanjaya Sekuriti 1993 (Akta 4978) dan boleh dihukum di bawah seksyen 32B(4) Akta yang sama.

[2] The "lampiran" to the amended charge consisted of two documents:

(i) A covering letter dated 6 January 1997 from Commerce International Merchant Bankers Bhd (later referred to as CIMB); and

(ii) A list of names of employees that were entitled for allocation of Pink Form shares of TCL Premier Holdings Berhad (later referred to as TPHB) and out of the list only 20 names with their respective allocation, under the column of "incentive" were marked in red.

[3] It is to be noted that as stated in the charge the "false information" are the ones that are so-marked in red. In passing, it is inevitable to observe that, the style and wordings of the charge preferred by the Securities Commission in respect of false information or false particulars is very different from the one adopted by the Anti-Corruption Agency in akin cases such as offences under s. 11(c) of the Anti-Corruption Act 1997 (or previously s. 4(c) of the Prevention of Corruption Act 1961). With such difference in style of preferring the charge, the court has to embark on an arduous task, to look for and analyse the particulars in the annexure in order to comprehend the alleged falsity.

Analysis Of Annexure To The Charge

[4] The first document is a covering letter dated 6 January 1997 from CIMB to the Securities Commission. To understand the contents of the letter, it is pertinent to reproduce the whole letter, which reads as follows:

COMMERCE INTERNATIONAL MERCHANT BANKERS BERHAD

Commerce Square, Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur, P.O. Box 12362, 50776 Kuala Lumpur. Tel: 2536688 Fax: 2535522 Telex: MA30903 PEBSAM

PRIVATE & CONFIDENTIAL

6 January 1997

SURUHANJAYA SEKURTTI
No. 3, Sri Semantan Satu
Off Jalan Semantan
Bukit Damansara
50490 Kuala Lumpur. SEGERA/DENGAN TANGAN

A Untuk Perhatian: Cik Yuan Leng

Tuan,

TCL PREMIER HOLDINGS BERHAD ("TCL")

B PROPOSED LISTING ON THE MAIN BOARD OF KUALA LUMPUR STOCK EXCHANGE

We refer to our letter to the Securities Commission dated 27 December 1996, and wish to advise that a few amendments have been made by TCL to the pink form allocation list since that date.
C The main reason for the amendments was that a number of TCL's remisiers were found to have been confirmed originally as dealers at TCL prior to their becoming remisiers.

Accordingly, we enclose the revised pink form allocation list. The amendments to the allocation list have been highlighted for your
D reference.

We apologise for any inconvenience caused. Please do not hesitate to contact either Mark Tan or the undersigned if you have any queries.

E Yang benar,

b/p COMMERCE INTERNATIONAL MERCHANT BANKERS BERHAD

Sgd.

F

Wong Mong Nee
Penolong Pengurus
Kewangan Korporat

c.c. Ms Mary Tan TCL Premier Holdings Berhad

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[5] The salient point to be noted from the above letter is that it encloses "the revised Pink form allocation list". In the second sentence of the 2nd para of the letter, it stated that: "The amendments to the allocation list have been highlighted for your
H reference." There is no indication anywhere in the charge, that these amendments as highlighted by CIMB also constituted part of the false information. In the absence of such indication, based on the revised Pink form allocation list, it must be observed that the list was as at 27 December 1996. The subject-matter of false
I information is therefore the revised list as at 27 December 1996. The falsity or otherwise of the said revised list must be construed at that material time, namely on 27 December 1996.

Ingredients Of The Offence

[6] The learned Deputy Public Prosecutor for the appellant submitted that there are 3 ingredients of the offence under s. 32(1)(c)(aa) of the Securities Commission Act 1993, namely:

(1) That the said information in the Pink form allocation list is required to be submitted to the Securities Commission in connection with a proposal submitted under s. 32 of the Securities Commission Act 1993;

(2) That the accused had caused the said information to be submitted to the Securities Commission through CIMB, The Merchant Bankers; and

(3) The said information is false or misleading.

[7] The appellant also submitted that the essence of the prosecution's case is that the said information submitted to the Securities Commission is false as the employees were not entitled to the shares that were stated to be allocated to them.

[8] From the appellant's submissions, it is the prosecution's case that the information on the allocation of the Pink form shares are false because the shares were later transferred out.

Falsity Of Information

[9] Out of the 20 names that were marked in red in the list of names of employees who were allotted Pink Form Shares, only 12 of them were called as witnesses, namely SP8 to SP23. All the 12 witnesses testified basically similar facts, namely:

– They knew of their respective allotment by notice on the company's notice board.

– They applied for all the shares allotted to them. All the application forms were dated 10 January 1997.

– All shares applied for were paid for and credited into their respective CDS accounts.

– They later transferred some of the shares, and for that purpose transfer forms were executed either on 24 January 1997 or 31 January 1997 (all after the date of allotment and date of application for the allotted shares).

[10] The applications for the allotted Pink form shares and the subsequent transfer of some of the shares (of which the number of shares transferred correspond with the amount stated under the column "incentive" in the Pink Form Allocation list dated 27 December 1996), were completed by execution of forms known as Security Transfer Request that were produced at the trial. For ease of reference of these relevant documentary evidence, it is tabulated as follows, as tendered by the respective 12 witnesses:

WITNESS	Exhibit (Application Form, all Dated 10/1/97)	Exhibit Security Transfer Request
SP8 Lim Boon Ling	P78	P54 (dated 31/1/97)
SP9 Nor Azita Bt. Osman	P79	P72 (dated 31/1/97)
SP10 Wong Lik Peng	P81	P73 (dated 31/1/97)
SP11 Cheng Keng Kwan	P83	P85 (dated 31/1/97)
SP12 Ong Cheng Leng	P92	P77 (dated 31/1/97)
SP13 Tommy Ong Kian Meng	P95	P70 (dated 31/1/97)
SP14 Mohd Nazri b. Mohd Tahir	P102	P74 (dated 31/1/97)
SP15 Seet Guan Chong	P103	P63 (dated 24/1/97)
SP16 Tan Soo Sim	P106	P71 (dated 31/1/97)
SP17 Jakimas @ Lokman	P112	P60 (dated 31/1/97)
SP18 Lim Yuet Ling	P115	P61 (dated 31/1/97)
SP19 Yoong Chee Shuenn	P117	P64 (dated 24/1/97)
SP20 Lim Bee Hong	P120	P57 (dated 24/1/97)
SP21 Lim Chye Har	P122	P75 (dated 24/1/97)
SP22 Goh Yueh Mei	P125	P59 (dated 24/1/97)
SP23 Sek Poh Choo	P128	P55 (dated 24/1/97)

[11] Despite the lengthy written and oral submissions by the learned counsel for the respondent, the crux of the matter in this appeal, remained as per the ingredients of offence as submitted by the learned Deputy Public Prosecutor.

[12] In order to understand the existence or otherwise of the falsity of information, it is proper to refer to the various documentary evidence tendered, including those that are dated earlier than the ones annexed to the charge.

Closer Study Of Documents

[13] The Pink form allocation list which was alleged to contain false information refers to exh. P10A, which was submitted to the Securities Commission, *vide* cover letter dated 6 January 1997 (exh. P10). In the letter P10, CIMB refers to another letter dated 27 December 1996. This letter dated 27 December 1996 from CIMB is exh. P8 and it enclosed a Pink form allocation list (which is exh. P8C). After the submission of the list to the Securities Commission (as shown in exhs. P8 and P8C) the Securities Commission approved that particular Pink form allocation list, *vide* their letter dated 2 January 1997 (which was marked as exh. P9). CIMB later *vide* letter dated 6 January 1997 submitted an amended list (exh. P10A) to amend the earlier approved list (exh. P8C). Is there any substantive difference between the approved list (P8C) and the amended list (P10A)?

[14] As stated earlier, in the 2nd paragraph of the letter (P10) the amendments to the allocation list have been highlighted for ease of reference. From a closer look at the highlighted amendments in exh. P10A, it can be seen on the first page, there were amendments to the columns under the headings: "Number of Eligible Employee/Remisier" and "Total Pink Form allocated". The total numbers of Employees/Remisiers remain unchanged, ie 204 and the total number of Pink Form allocation also remained the same, ie one million.

[15] The other noticeable amendments are in respect of 1 employee and 7 remisiers. From the allocation list, it can be inferred that employees were given Pink form allocation based on formula and incentive, but for remisiers there are no allocation for incentive. It is also observed that the 7 remisiers's share allocation are not the subject of the charge as their names were not marked (or underlined) in red in the annexure to the amended charge.

[16] After such analysis of the documents, it can be concluded that the only relevant difference between the contents of the allocation list (in P8C) and the amended allocation list (as in P10A) is the minor increase of 2000 shares (incentive shares) allotted to one, Ong Cheng Leng (SP12).

[17] The explanation given by CIMB as to why an amended allocation list need to be submitted is self-explanatory in the 1st paragraph of the letter dated 6 January 1997 (exh. P10) which reads as follows:

> We refer to our letter to the Securities Commission dated 27 December 1996, and wish to advise that *a few amendments have been made by TCL to the Pink form allocation list* since that date. *The main reason for the amendments was that a number of TCL's remisiers were found to have been confirmed originally as dealers at TCL prior to their becoming remisiers.*

[18] With such background and reasoning for the amendment to the allocation list and with the minimal change in the actual share allocation and with the fact that the allocation list was actually approved much earlier by the Securities Commission, *vide* their letter dated 2 January 1997 (exh. P9), it can be concluded that it would be preposterous to say that the list contained false information!

Position In Law Of "Allocation Of Shares"

[19] The alleged false information is in respect of the allotment of shares to the employees and remisiers of the company. From facts adduced, after the allotment, the employee/remisier have to apply for the shares by using the 'Pink Forms'. Allotment was made on 27 December 1996 and the Pink forms were issued for purposes of share application, on 10 January 1997.

[20] *Jowitt's Dictionary of English Law*, 2nd edn, vol. 1, defines "Allotment" – In the law of companies, to allot shares, debentures, etc., is to appropriate them to the applicants or persons who have applied for them; this is generally done by sending to each applicant a letter of allotment, informing him that a certain number of shares has been allotted to him, and he is then called an allottee. An allotment of shares pursuant to an application for them constitutes, with the application itself, an agreement binding both on the applicant and on the company, the application being an offer to take their shares and the allotment an acceptance of the offer."

[21] The contractual nature given to the meaning of allotment of shares can be seen in the case of: *Mears v. Western Canada Pulp And Paper Co. Ltd.* [1905] 2 Ch. 353.

[22] From the above meaning it can be concluded that the word "allocation" is a noun from the verb, "allocate" which means assign or distribute. Therefore once a person has been allocated shares, he will have a right over the shares as an allottee. Such right gives a legal entitlement to the allotted shares. In the context of this case, such person has the legal entitlement to apply for the allotted shares.

[23] As can be seen from the documents of application for the pink-form shares as allotted to the employees, namely exhs. P78, P79, P81, P83, P92, P95, P102, P103, P106, P112, P115, P117, P120, P122, P125, and P128, that were executed by the respective witnesses SP8 to SP23, the following salient facts are disclosed:

(a) All the application forms are dated 10 January 1997, ie the date of the offer shares are open for application.

(b) The applications are for the number of shares allotted to the respective employees. The amount of shares applied for and the amount of shares allotted to them respectively, do tally.

(c) Each of the application form has the following words in the last paragraph (before the date and signature of the applicant):

> I/We hereby irrevocably authorize the Directors of the Company ... to place my/our name on the Record of Depositors in the name of Malaysian Central Depository Nominees Sdn. Bhd. maintained by MCD which forms part of the Company's Registrar of Members in respect of the ordinary shares allotted to me/us, and I/we verily affirm that the Ordinary Shares are not being acquired by me/us as a nominee of another person or persons.

[24] The above quoted paragraph of the application form is a declaration of the true facts pertaining to the position of the allotted shares *vis-a-vis* the applicant. Subsequently all the shares applied for were credited into the respective CDS accounts of the respective witnesses/employees.

[25] Based on the definition of "allotment of shares" as explained earlier, and the eventual application and crediting of the applied shares into the respective CDS accounts, surely it is not wrong to conclude that the application forms for the allotted shares is a contract that is subjected to the purview of ss. 91 and 92 of Evidence Act 1950, for purposes of evidential value.

[26] Applying these sections to the facts of the case, it is clear that the prosecution's witnesses, SP8 to SP23 cannot by oral evidence contradict, vary, add or subtract from the terms of the document of the contract, namely the application form. A *fortiori* when the application form contained the affirmative declaration, as quoted above.

[27] The correct statement of the law relating to s. 91 and s. 92 of the Evidence Act 1950 can be seen in the Federal Court case of: *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229 at 233.

[28] It is also clear that s. 91 and s. 92 of the Evidence Act 1950 are applicable also to criminal cases (see Federal Court decision in *Ah Mee v. PP* [1967] 1 MLJ 220; *Inspector General of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260*; PP v. Krishnan a/l Letchumanan & Anor* [1995] 2 MLJ 690 and *PP v. Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196).

[29] Of course, there are exceptions to the exclusion of oral evidence in respect of a contract that is reduced to the form of a document. Probably in the case today, it may be relevant to refer to the proviso (a) of s. 92 of the Evidence Act 1950. Here evidence to invalidate any document may be allowed, if it relates to fraud or intimidation. See case of: *Tan Chong & Sons Motor Co. (Sdn) Bhd. v. Alan Mcknight* [1983] 1 MLJ 220. However in our case, evidence of such alleged intimidation by the respondent is very sketchy. Many of the prosecution's witnesses could not remember; some agreed to the arrangement and over and above that, none of them complained to anybody about the arrangement. Any agreement or consent of the employees will surely negate any element of fraud or intimidation by the respondent. No extrinsic evidence was given to invalidate the contract. It must be reminded that any evidence admitted under the proviso to s. 92 of the Evidence Act 1950, has to be weighed against the act and conduct of parties, namely the applicant/employee. See case of *NS Narainan Pillay v. The Netherlandsche Handal Maatschappij* [1934] MLJ 227 at 235. Furthermore in this appeal, the respondent is not a party to the contract. The contract is between the company and the employee. See: *DG of Inland Revenue v. Ee Sim Sai* [1977] 2 MLJ 32.

[30] Although not submitted by parties to this appeal, it is note worthy to say that certain provisions of the Companies Act 1965 do have some bearing in this case. For example, s. 103(1) of the Companies Act 1965 which reads as follows:

Instrument of transfer

103(1) Notwithstanding anything in its articles, a company shall not register a transfer of shares or debentures unless a proper instrument of transfer in the prescribed form has been delivered to the company, but this subsection shall not prejudice any power to register as a shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

and s. 107B of the same Act, which reads as follows:

Depositor deemed to be member

107B(1) Notwithstanding section 100, a depositor whose name appears in the record of depositors maintained by the central depository pursuant to section 34 of the Securities Industry (Central Depositories) Act 1991 in respect of the securities of a company which have been deposited with the central depository shall be deemed to be a member, debenture holder, interest holder or option holder, as the case may be, of the company, and shall, subject to the provisions of the Securities Industry (Central Depositories) Act 1991 and any regulations made hereunder, be entitled to the number of securities stated in the record of depositors and all rights, benefits, powers and privileges and be subject to all liabilities, duties and obligations in respect of, or arising from, such securities (whether conferred or imposed by the Act or the memorandum or articles of association of the Company).

(2) Nothing in this Division shall be construed as affecting the obligation of the company to keep a register of its members under section 158, a register of holders of debentures under section 70, a register of interest holders under section 92 and a register of option holders under section 68A and to open them for inspection in accordance with the provisions of this Act except that the company shall not be obliged to enter in such registers the names and particulars of depositors who are deemed to be members, debenture holders, interest holders or option holders.

A (3) Notwithstanding any other provision of this Act, a depositor shall not be regarded as a member of a company entitled to attend any general meeting and to speak and vote threat unless his name appears on the record of depositors not less than three market days before the general meeting.

B (4) The record of depositors shall be *prima facie* evidence of any matters inserted therein as required or authorized by this Act.

(5) For the purpose of this section, "market day" means any day between Mondays and Fridays which is not a market holiday of the stock exchange or public holiday.

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[31] All the witnesses (SP8 to SP23) are depositors of the Central Depository. Such depositors, in law, are deemed to be "entitled to the number of securities stated in the record" of their CDS accounts. It is a presumption under the law, of the rights D and entitlement of these witnesses. Applying the law to the facts of the case, where the allocation was materialised by application and solidified by the crediting of the shares into the respective CDS accounts of the applicants, it clearly shows that the allocation was not false. It is a finding of fact, that from the E material time of allocation, namely on 27 December 1996, to the date of the application of such allocation, namely on 10 January 1997, such allocation are not false. Any subsequent transfer of a portion of the allotted shares will not in any way make the original allocation false. After all once the allotted shares are transferred F into the respective CDS accounts, the shares can no longer be distinguished between the ones allotted under formula of length of service of employee and the ones allotted for incentives.

On Ingredient Of "Causing" The Submission

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[32] Here again, we have to look at the background history of the submission of the "revised Pink form allocation list". As stated earlier this revised Pink form allocation list was sent after the earlier approval of the Pink form allocation list by the Securities Commission, *vide* their letter dated 2 January 1997 (exh. P9). The H approval as made *vide* letter dated 27 December 1997 (exh. P8). The letter dated 6 January 1997 (P10) cannot be read in isolation in order to ascertain who caused the submission of the allocation list (P10A).

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[33] There are a host of other earlier correspondences to the Securities Commission that will show that all submissions of information, relating to the proposal that have to be submitted to the Securities Commission were, as a matter of accepted practice, were done by CIMB or its officers. The correspondences referred to, can be seen in exhs. P2 (letter dated 10 November 1995); P4 (letter dated 10 April 1995); P5 (letter dated 18 April 1996); P7 (letter dated 18 December 1996) and P8 (letter dated 27 December 1996).

[34] The covering letter that enclosed the allocation list (P8C) dated 27 December 1996 was no exception as it was signed by one, Wong Mong Nee of CIMB. The proposed employee share allotment was confirmed by the Executive Chairman of the company, one Jimmy Tan Soo Sum (see exh. P8A).

[35] The Pink form allocations were approved by all the members of the Board of Directors; and the information for submission were approved by the Board of Directors. This can be seen in the evidence of SP5, Latiff bin Thamby Chik. Such evidence can also be seen in the testimonies of the other members of the Board of Directors, namely SP26, Chow Yook Hey, SP28, Tan Soo Kim, and SP29, Loh Teck Yen.

[36] Furthermore under paragraph 10.19 of the Securities Commissions Policies & Guidelines (exh. P147) although not having a force of law, but regulatory in nature, the Company's Board of Directors is given the discretion to determine the allocation. The respondent is just an employee of the company and she acts at the behest of the Board of Directors. Such evidence can even be seen in the testimony of the Assistant Manager of Securities Department of the Securities Commission, SP1, Yuan Leng, who under cross-examination gave negative answers as to the role and knowledge of the respondent in the submission of the information to the Securities Commission.

[37] In the light of that, I cannot find any evidence to show that the respondent ever had the power or authority to cause the Pink form allocation list to be submitted to Securities Commission. It was an on-going process whereby all submissions are done by the Merchant Bankers, CIMB, which of course acted on the instructions and directive of the Company's Board of Directors.

A

Conclusion

[38] In his grounds of judgment, the learned Sessions Court Judge identified the 3 ingredients of the offence under s. 32B(1)(a), (aa) of the Securities Commission Act 1993, which was
B subsequently amended to an offence under s. 32B(1)(c)(aa). Basically the ingredients of the original charge and the amended charge, are the same, except that in the former it is an offence by the company and its officers whereas in the later it is an offence by "any other person". After identifying the ingredients of the
C offence, the learned trial judge, after analyzing the evidence in the prosecution's case, came to conclusion that at the end of the prosecution's case, the prosecution has failed to prove its case in respect of two essential ingredients, namely (i) the false or misleading information and (ii) the submission of such false
D information was caused by the accused.

[39] In essence the learned trial judge made a finding of fact in respect of the 2 ingredients. He made no finding in respect of the other ingredient.

E **[40]** On my part, after reading and hearing the submissions of both parties, and after perusing the appeal record and its voluminous documentary exhibits, I must say that the trial judge was correct in his findings. The only ingredient that has been proven by the prosecution is that the information in the Pink form
F allocation is required to be submitted to the Securities Commission in connection with a proposal under s. 32 of the Securities Commission Act 1993. The other two essential ingredients has not been proven. Accordingly, I dismiss this appeal by the prosecution.

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